



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX**

75 Hawthorne Street  
San Francisco, CA 94105

**BY ELECTRONIC MAIL, READ RECEIPT REQUESTED**

Julie Kay Hardie  
Vice President, Legal  
Seismic Exchange, Inc.  
4805 Westway Park Boulevard  
Houston, Texas 77041

**Re: Advanced Determination Concerning Confidential Business Information contained in  
Underground Injection Control Permit Application No. R9-UIC-CA6-FY20-1**

Dear Julie Kay Hardie:

Seismic Exchange, Inc. ("SEI," or the "Company") has asserted a claim of confidentiality for seismic data contained in seven images in Clean Energy Systems' (CES) pre-construction permit application for an Underground Injection Control ("UIC") Class VI well. The United States Environmental Protection Agency ("EPA" or "Agency") is making an advanced confidentiality determination pursuant to 40 C.F.R. § 2.204(a)(3) for that information that is claimed as confidential. On August 14, 2020, EPA requested that you substantiate your claim of confidentiality ("request for substantiation"). On September 3, 2020, the Company submitted its substantiation response to EPA's request ("substantiation"). In the response, the Company asserted that figures 14, 15, 16, 17, 18 19, 20, 32, and 33 in CES' application are owned or exclusively licensed by SEI, and that specific portions of Figures 15-20, and 33, which have either been partially or completely redacted, should be maintained as confidential because they directly display or incorporate the actual geophysical data (traces) and were provided to CES subject to an SEI Master Geophysical Data Use License (SEI MLA). This decision will address whether the seismic data in figures 15-20, and 33 in CES' application should be treated as confidential. The Company is not asserting a claim of confidentiality for figures 14 and 32 because those images are available in limited quantities to potential SEI clients without confidentiality restrictions in place.

I have carefully considered the Company's claims of confidentiality, its substantiation, and the recommendation from EPA Region 9's Water Division, Groundwater Protection Section. For the reasons stated below, I find that the information claimed as confidential is entitled to confidential treatment.

**DISCUSSION**

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person that is privileged or confidential." 5 U.S.C. § 552(b)(4).

In order for information to meet the requirements of Exemption 4, EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information that is (a) obtained from a person, and (b) that is privileged or confidential. Information meeting one of these two tests is commonly referred to as “Confidential Business Information” or “CBI.” The Company’s substantiation for confidential treatment of the information identified above relies upon the documents containing trade secrets.

## **ANALYSIS**

### **I. Threshold Requirements**

EPA’s regulations at 40 C.F.R. § 2.208(a)–(d) set forth the threshold requirements for an EPA determination that the information is entitled to confidential treatment pursuant to Exemption 4 of the FOIA. For business information to be entitled to confidential treatment, the Agency must have determined, *inter alia*, that:

- (a) The business has asserted a claim of confidentiality and that claim has not expired by its terms, nor been waived, nor withdrawn;
- (b) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
- (c) The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding); and
- (d) No statute specifically requires disclosure of the information.

40 C.F.R. § 2.208(a)–(d).<sup>1</sup>

In its substantiation, the Company maintained its confidentiality claim over certain seismic data submitted as part of the pre-construction application for a UIC Class VI well under the SDWA. The Company has not subsequently withdrawn its confidentiality claim. The Company has also taken reasonable measures to protect the confidentiality of the seismic data contained in the images that it licensed to CES. Substantiation at 3. The information is not reasonably obtainable without the Company’s consent and no statute specifically requires disclosure. *Id.*

Since the Company meets the requirements of 40 C.F.R. § 2.208(a)–(d) for the information that it claims as confidential, the decision will next consider whether this information is 1) a trade secret or (2) commercial or financial information that is (a) obtained from a person, and (b) privileged or confidential (commonly referred to as “CBI”).

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<sup>1</sup> 40 C.F.R. § 2.208(e) conflicts with the holding in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). In light of the *Argus Leader* decision, the Agency will not consider 40 C.F.R. § 2.208(e) in this determination. The Agency anticipates amending 40 C.F.R. § 2.208 so that it is consistent with the decision in *Argus Leader*.

## **II. Trade Secret**

The definition of “trade secret” under the FOIA is limited to “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a “direct relationship” between the trade secret and the production process. *Id.* Here, the Company stated in its substantiation letter that the information at issue constitutes a trade secret.

In your letter, you provided information that demonstrates a direct relationship between the requested information and the process of producing seismic data. The Company specifically described the unique property and value that the information brings to the product. You also explained that disclosing the information would reveal the process of creating these unique properties in the product, allowing other companies or competitors to potentially “reverse engineer” the data for use outside of a license granted by the Company. In its analysis of this matter, EPA has not identified any reason for not accepting the assertions made by the Company in regard to the nature of the information it claims as CBI and the claim appears reasonable. As such, the Company has adequately demonstrated that disclosing the requested information would allow the identification of a trade secret and commercially valuable process used for the making, preparing, compounding, or processing of trade commodities. I conclude that the information qualifies as a trade secret and therefore is exempt from disclosure under Exemption 4 of the FOIA.

## **III. Confidential Business Information (“CBI”)**

As an alternative to finding the information is trade secret, the information would also qualify for CBI under Exemption 4 by being (a) commercial or financial information that is (b) obtained from a person and (c) privileged or confidential.

### **A. “Commercial” or “Financial”**

The terms “commercial” or “financial,” for purposes of Exemption 4 of the FOIA, should be given their “ordinary meanings.” *National Ass’n of Homebuilders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2003) (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). The information at issue concerns a product produced by the Company for licensing as part of its business, thereby meeting the ordinary definition of “commercial.”

### **B. “Obtained from a Person”**

Next, this decision considers whether the Company’s images containing seismic data was “obtained from a person” for purposes of Exemption 4. The Company meets the definition of the term “person,” as defined by EPA’s regulations at 40 C.F.R. § 2.201(a). Consistent with the definition of “obtain,” the D.C. Circuit focuses on whether the information at issue originated from outside the government agency. *Board of Trade of City of Chicago v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 404 (D.C. Cir. 1980); *Gulf & Western Indus. v. U.S.*, 615 F.2d

527, 530 (1979). “Information originally obtained from an outside source, but later included in agency documents, may be considered ‘obtained from a person’” and qualify for Exemption 4 protection. *Ctr. For Auto Safety v. U.S. Dep’t of Treasury*, 133 F. Supp. 3d 109, 123 (D.D.C. 2015); see, *EPIC v. Department of Homeland Security*, 117 F. Supp. 3d 46 (D.D.C. 2015); see also *San Juan Citizens Alliance v. U.S. Dep’t of the Interior*, 70 F. Supp. 3d 1214 (D. Col. 2014).

EPA obtained this information from the Company, which is considered a “person” outside of the Agency. The Company’s seismic data was therefore obtained from a person for purposes of Exemption 4.

### **C. “Privileged or Confidential”**

Finally, in order to qualify as CBI, the information must be “privileged or confidential.” The Company has claimed that the information at issue is “confidential.” The United States Supreme Court in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) recently evaluated the definition of “confidential” as used in Exemption 4. The Court held that at least where “commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4.” *Argus Leader*, 139 S. Ct. at 2366. As a result, this determination considers the conditions established by *Argus Leader* in deciding whether the claimed information qualifies as confidential under FOIA Exemption 4. See *Argus Leader*, 139 S. Ct. at 2366; see also *Exemption 4 After the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media and Accompanying Step-by-Step Guide*, United States Department of Justice, Office of Information Policy (Oct. 4, 2019) (available at <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>).

#### **1. Does the Company customarily and actually keep the information private or closely-held?**

The pre-construction application contains 2D seismic data images that incorporate geophysical data (traces) that are owned or exclusively licensed by SEI and were provided to CES subject to an SEI MLA. Substantiation at 2.

The Company asserted that it customarily keeps the information described above private. The Company takes significant measures to protect its seismic data by licensing the data to its customers for a fee. The company claims that “[p]otential licensees are allowed to view the data only in supervised and controlled environments prior to a license purchase.” Substantiation at 3. Each license purchase is subject to a binding agreement with the Company to protect the confidential nature of the data contained in the seismic images. *Id.* The Company retains sole discretion to either prohibit or allow a licensee to share the seismic data with a third-party. If the information is shared with a third-party, then the data is “sanitized” so that a third-party would not be able to use the data or reverse engineer it outside of a licensing agreement with SEI. *Id.*

After careful consideration of the Company’s substantiation and the seismic data at issue, I find that the Company customarily and actually treated this information as private.

**2. Did EPA provide an express or implied assurance of confidentiality when the information was shared with EPA?**

EPA did not provide express or implied assurances to the Company that the information would be considered CBI when it was submitted to the Agency. However, EPA's CBI regulations at 40 C.F.R. Part 2 provide that the Agency treats information claimed as CBI as confidential pending a confidentiality determination by the appropriate EPA legal office or a "clearly not entitled" determination by a program office. For purposes of this determination, these regulations may be considered an assurance that the information would at least be temporarily treated as confidential.

**3. Were there any express or implied indications, at the time the information was submitted, that EPA would publicly disclose the information?**

Next, EPA considers whether, at the time of submission, there was an express or implied indication that EPA would publicly disclose the information. If there was such an indication, then the information may not be confidential. At the time of submission, EPA provided no express or implied indication that it would publicly disclose the information.

In sum, as explained above, the Company customarily and actually treated the claimed information as private and the assurance of confidentiality consideration does not weigh against the application of Exemption 4. Therefore, the information qualifies as confidential under Exemption 4.

**CONCLUSION**

Pursuant to EPA's regulations at 40 C.F.R. §§ 2.204(f)(6) and 2.204(f)(9), the EPA Region 9 Water Division has been consulted about whether your claim of confidentiality is valid. The Water Division supports the Company's assertions that the pertinent seismic data in the application be kept confidential.

Upon consideration of the Company's claims for protection, substantiation of those claims, and the recommendation by the Water Division, the Agency has found that the seismic data contained in figures 15-20 and 33 of CES' application is confidential business information under Exemption 4.

This constitutes the final EPA determination concerning your business confidentiality claim. *See* 40 C.F.R. § 2.205(f). This determination may be subject to judicial review under 5 U.S.C. §§ 701 *et seq.* EPA may release the information that does not qualify as confidential business information on the tenth working day after the date of your receipt of this determination, unless you file an action in Federal court (1) to obtain judicial review of this determination and (2) to obtain preliminary injunctive relief against disclosure. Such action must be filed in Federal court within 10 working days after the date of your receipt of this determination. If you pursue an action in Federal court, please notify me and Desean Garnett in the Office of Regional Counsel, EPA Region 9. Even if you have commenced an action in

Federal court, EPA may make this information available to the public if the court refuses to issue a preliminary injunction or upholds this determination. In addition, EPA may make this information available to the public, after reasonable notice to you, whenever it appears to the Agency that you are not taking appropriate measures to obtain a speedy resolution of the action.

Should you have any questions concerning this matter, please contact Desean Garnett at [garnett.desean@epa.gov](mailto:garnett.desean@epa.gov) or (415) 972-3046.

Sincerely,

**SYLVIA  
QUAST**

Sylvia Quast  
Regional Counsel  
EPA Region 9

Digitally signed by  
SYLVIA QUAST  
Date: 2021.06.03  
11:27:36 -07'00'

cc: Yenhung Ho, Water Division  
David Albright, Water Division